SPECIAL LEGISLATION FOR MUNICIPALITIES.

THE constitutions of many of our states provide for general laws and prohibit special or local laws with reference to municipal corporations.[1] These provisions have been in force long enough for their results to be seen and stated.

Webster defines "general" as "Properly, relating to a whole genus or kind, and hence relating to the whole class or order"; and "special" as "Designating a species or sort." Other lexicographers give the same definitions. A clause in a constitution that legislation regarding municipalities shall be general, is a requirement that it shall relate to a genus and not to a species.

Genus and species are relative terms, and it is possible to divide the genus, municipal corporation, or county, city, town, village, borough, etc., into species, each of which species in turn will be capable as a genus of being divided again into other species, and so on indefinitely.[2] Thus the genus "all cities" may be divided into different classes according to number of inhabitants; as, for example, cities having 100,000 or less, cities having 100,000 to

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[1] The Constitution of Ohio, for example (Art. XIII. Sec. 1), provides: "The General Assembly shall pass no special act conferring corporate powers." The Constitution of Illinois (Art. IV. Sec. 22) provides: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . incorporating towns, cities, or villages, or changing or amending the charter of any town, city, or village." The Constitution of New Jersey provides (Sec. VII. Par. 11): "The legislature shall not pass private, local, or special laws in any of the following enumerated cases; that is to say: . . . Regulating the internal affairs of towns and counties." Similar provisions exist in a great number of the constitutions of the various states.

[2] Professor Jevons ("Elementary Lessons in Logic" (1882) 98, 100) states: "Any class of things may be called a genus (γένος, race or kind), if it be regarded as made up of two or more species. 'Element' is a genus when we consider it as divided into the two species, 'metallic and non-metallic.' Triangle is a genus as regards the species acute-angled, right-angled, and obtuse-angled. On the other hand, a species is any class which is regarded as forming part of the next larger class, so that the terms genus and species are relative to each other, the genus being the larger class which is divided, and the species the two or more smaller classes into which the genus is divided. . . . It will easily be seen that the same class of things may be both a genus and a species at the same time, according as we regard it as divided into smaller classes or forming part of a larger class."

200,000, and cities having more than 200,000. Each of these classes is a species with reference to the genus "all cities," and each of them as a new genus may in turn be divided into new species. Such classification may be continued almost without limits, until approximately each municipality is placed in a separate class, and is as certainly designated as if mentioned by name. This classification according to population, with separate legislation for each class, has generally, though not uniformly, been sustained by the courts as not violating the constitutional requirement for general legislation.

Municipal corporations may also be divided according to other characteristics; for example, location on the seashore, on rivers, or inland not on rivers. Then in turn cities on the seashore may be divided according to population, or some other characteristic, and so on. Here "all cities" will be the genus with respect to the first division, namely, on the seashore, on rivers, and inland not on rivers, and each of these three divisions is a species; but in turn, each of these would become a genus of the next lower class, and so on indefinitely. Still another classification often resorted to singles out some particular thing like a public hospital, or a high school, or a floating debt. It is obvious that the legislature, by selecting some characteristic of the city for which legislation is desired, may readily make a class which shall embrace only such city.

When, therefore, the constitution of a state provides that all laws with respect to municipal corporations shall be general, it is only saying that such laws shall be enacted with respect to some genus. What genus is meant, or how the genus shall be determined, the constitutions generally do not state, although some of them expressly provide for a classification by population. The courts, accordingly, in the numerous cases which have arisen, have been compelled to determine what genus is permissible. One possible view is that all legislation with regard to cities must apply to all cities in the state. This view would have in its support the proposition that the clause in the constitution is to be given an effect as broad as the territory over which the constitution extends. Very few courts, if any, have taken this stand. If legislation may be had with respect to fewer cities than all, classification is necessary. Such classification might be left wholly to the legislature, the only requirement being that it should mark out a genus of some kind. In short, while it might not mention a particular city by name, it

might in general language so describe such city as to make certain that the law would apply to that one only.

A striking instance of this kind of "general legislation" (though not relating to municipalities as such) arose under that clause of the New York Constitution which provides: [1]

"The legislature shall not pass a private or local bill in any of the following cases: . . . Granting any corporation, association, or individual the right to lay down railroad tracks."

Section 36 of the Railroad Act of 1875, commonly known as the Rapid Transit Act, made certain provisions with reference to "any elevated steam railway or railways now in actual operation," permitting the company owning such railway to lay down certain additional tracks. There was only one railway which answered this description, and the legislation applied, and was intended to apply, only to this railway. The Court of Appeals held that the law was general.[2] This decision has been taken as deciding that classification is a matter of almost, if not quite, unlimited legislative discretion.[3] If it is unlimited, the clause in the Constitution has obviously no effect.

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[1] Art. III. § 18.

[2] Matter of Elevated Railway, 70 N. Y. 327, 350.

[3] In the Matter of Church, 92 N. Y. 1, the Court of Appeals held that an act giving the Board of Supervisors in any county containing an incorporated city of over 100,000 inhabitants, where contiguous territory in the county has been mapped out into streets and avenues, power to lay out and open the same, is not a local law within the meaning of the state Constitution, Art. III. § 18, prohibiting the passage of a local or private law for laying out or opening highways.

So also in the Matter of New York & Long Island Bridge Company, 148 N. Y. 540, notwithstanding the provisions of Art. III. § 18 of the Constitution, prohibiting local legislation granting to any corporation the right to lay down railroad tracks, the court held the following act valid: "Any company incorporated for the purpose of constructing and maintaining a bridge or bridges over any river, bay, arm of the sea, or other body of water, connecting any city in the State of New York, containing more than one million inhabitants, with any other city in said state, is hereby empowered to lay tracks and operate a railway upon such bridge or bridges" (Chap. 225, Laws of 1893).

Judge O'Brien, in his dissenting opinion in the Matter of Henneberger, 155 N. Y. 420, 435, states, with regard to this act, what was common knowledge: "There never was the least doubt that the law was intended for but one place in the state, and that was a bridge across the East River from New York, and yet this Court held it to be valid as a general law." The same judge states, in the same case, p. 436, with reference to the act involved in the Church case, *supra*: "Indeed the later case was intended and admitted to be a law for a single county, since the conditions existed in no other county."

The utter uselessness under the above cases of the clauses in the New York Constitution prohibiting local legislation, has apparently led the Court of Appeals to

For many years the Ohio legislature, with the sanction of the courts, classified municipalities according to population to such an extent as to be equivalent to legislation by name. The Revised Statutes provided: [1]

"Municipal corporations are divided into cities, villages, and hamlets; cities are divided into two classes, first and second; cities of the first class are divided into three grades, first, second, and third; cities of the second class are divided into four grades, first, second, third, and fourth; cities of the second class, which hereafter become cities of the first class, shall constitute the fourth grade of the latter class; and villages, which hereafter become cities, shall belong to the fourth grade of the second class."

The next two sections divided cities of the first and second classes into grades, according to population, so that Cincinnati, Cleveland, Toledo, Columbus, and Dayton were each the only cities in their respective grades. Sandusky, Springfield, Hamilton, Portsmouth, Zanesville, and Akron were the only cities in the third grade of the second class, and all others were in the fourth grade. It would be a mistake, however, to suppose that legislation for even these last cities was uniform. I have taken up at random a volume of the session laws of Ohio — the one for 1892 — and on page 144 is an act as follows:

"that in any city which at the federal census of 1890 had, or which at any subsequent federal census may have, a population of not less than twenty-

modify the rule that it will not interfere with the legislative discretion in the matter of classification, for in the Matter of Henneberger, 155 N. Y. 420, that court, by a vote of four to three, held an act to be local and invalid although it was expressed in general language. The act in question (Chap. 286, Laws of 1897) provided: "In any town having a total population of eight thousand or more inhabitants and containing an incorporated village having a total population of not less than eight thousand and not more than fifteen thousand inhabitants, except in the County of Madison, any five or more persons holding lands adjoining or abutting on any highway, which extends within the limits of such town and without the limits of such incorporated village for a distance of at least two and one-half miles, may present to the Supreme Court at a Special Term thereof, to be held in the county containing such town, a petition for the appointment of three commissioners for the purpose of widening and improving such highway or a specified portion thereof not less than two miles and a half in length, such miles being wholly without the limits of such incorporated village." This attempt was more than the Court of Appeals could endure. The act applied and was intended to apply, only in the town of New Rochelle. Just how far this court will exercise control over the power of the legislature to make classifications for the purpose of general legislation remains to be seen. This New Rochelle act appears to have been a little more clumsy than some of the so-called general laws which have been sustained by the same court, but, as Judge O'Brien shows in his dissenting opinion, it was no more specific than the acts in the other New York cases above cited.

[1] 1890, § 1546.

six thousand (26,000), and not more than thirty thousand (30,000), the City Council may by resolution," etc.,

giving authority to issue bonds for police equipment. Printed on the margin in this official volume are the words "Akron and Canton," and these were the only cities to which the act applied. Villages, too, were put in different classes, but it would be a mistake here also to suppose that all legislation as to each class was uniform. The very next act after the one last mentioned is as follows:

"that any village of the State of Ohio which at the last federal census had, or which at any subsequent federal census may have, a population of not less than eight hundred and sixty (860), nor more than eight hundred and seventy (870), be and is authorized to issue its bonds," etc.;

and printed in the margin is the word "Malta," indicating the only village to which the act applied. Many other such instances might be cited.[1] So for a long series of years Ohio had numerous similar statutes, which under decisions of the Supreme Court were general laws. It is hard to see what advantage this cumbrous system has over legislation for municipalities by name.

These are examples of the kind of legislation which has existed more or less in most states whose constitutions require general legislation as to municipalities. The Ohio statutes are perhaps extreme cases, but the principle on which they rest is supported by decisions in the courts of other states.

In 1874 the Pennsylvania legislature passed an act dividing cities into classes, which, among other things, provided that "cities containing a population exceeding 300,000 shall constitute the first class." It was well known that the only city embraced in the first class was Philadelphia, yet the Supreme Court held that legislation which applied only to that class was general.[2]

The courts of some of the states, seeing that such classification and legislation are in effect legislating for particular cities, have sought to state some reason to justify them. Among other rules is one which may be called the "growing" rule. This is based on the idea that legislation for municipal corporations is a distribution of favors in which all are entitled to participate, and if all are

[1] Other acts applied to any municipality which had at the last federal census the definite number of inhabitants specified in such acts respectively. These acts were held invalid when the "growing" rule hereafter mentioned was adopted.

[2] Wheeler *v.* Philadelphia, 77 Pa. St. 338.

fairly treated, the law is to be regarded as general. Therefore a classification according to population is valid which treats alike all cities which now have or hereafter may have a certain population. The provision which makes such legislation apply to all cities which hereafter may have the prescribed population is supposed to relieve it from any objection. It matters not that the cities may not actually grow to have such a population; the mere possibility of such growth is sufficient.

"Legislation is intended not only to meet the wants of the present, but to provide for the future. It deals not with the past, but, in theory at least, anticipates the needs of a state healthy with a vigorous development. It is intended to be permanent. At no distant day Pittsburg will probably become a city of the first class; and Scranton, or others of the rapidly growing interior towns, will take the place of the city of Pittsburg as a city of the second class. In the meantime is the classification as to cities of the first class bad because Philadelphia is the only one of the class? We think not. Classification does not depend upon numbers."[1]

That sounds plausible. But if the learned justice really thought, as no doubt he did, that "at no distant day Pittsburg will probably become a city of the first class," he reckoned without his host, for the legislature has taken good care that it shall not. When the population approached such numbers that it was at all likely to become a city of the first class, the legislature provided for a new classification by which cities of the first class should be "those containing a population of 600,000 or over";[2] and later, in order that it might not grow into this class, made still another classification providing that the first class should consist of cities "containing a population of 1,000,000 or over."[3] How long, at this rate, will it take Pittsburg to become a city of the first class?

When a court says that the classification of cities according to population is permissible, because other cities may grow into the higher classes, it is, in fact, speaking of a classification of cities which do not exist and may never exist, that is, of other cities which have the required population. It is a classification of mere possibilities. As to cities actually in existence, the classification is the same as if they were called by name, and it is kept such that, as to

[1] Paxson, J., in Wheeler *v.* Philadelphia, 77 Pa. St. 338, 349. See also State *v.* Hawkins, 44 Oh. St. 98; State *v.* Anderson, 44 Oh. St. 247; Johnson *v.* Milwaukee, 88 Wis. 383; Alexander *v.* City of Duluth, 77 Minn. 445; Walker *v.* City of Cincinnati, 21 Oh. St. 14.

[2] Act of May 8, 1889 (P. L. 133).

[3] Act of June 25, 1895 (P. L. 275).

all others, it always remains a classification of mere possibilities. In other words, the reason given by the court is a transparent fiction. As well might a promise be held out to a dwarf that he shall receive some good thing when he grows to be a giant as to hold out to small cities a promise that a statute which applies only to cities having a million or more inhabitants, will confer certain powers on them when they grow to the same size.

Classification by population, moreover, is necessarily arbitrary. A difference of one in the number of inhabitants cannot make different legislation necessary or appropriate. To say that a line must be drawn somewhere, is to beg the entire question.

After such decisions by the Supreme Court of Ohio for more than a score of years, and after municipalities had for this long time carried on their affairs under such legislation, levying taxes and assessments, creating liens and affecting titles, and borrowing money, that court suddenly, in the year 1902, made a series of decisions holding all such legislation special and invalid. An act passed April 14, 1900, which provided "that any city of the third grade of the first class may . . . construct . . . a bridge or bridges across any navigable river or rivers passing into or through such city,"[1] etc., and one which provided for "the appointment, regulation, and government of the police force in cities of the third grade of the first class,"[2] were held unconstitutional. A similar decision was rendered for the same reason in respect of an act which was intended to relate only to the city of Cleveland.[3] This was in June, 1902. The court, however, perceiving that a judg-

[1] Platt *v.* Craig, 66 Oh. St. 75.

[2] Ohio *ex rel. v.* Jones, 66 Oh. St. 453. The court says, p. 483: "The act is said to be general and not special, because it provides for "the appointment, regulation, and government of a police force in cities of the third grade of the first class. That it affects no municipality in the state except Toledo is admitted. But the fact is said to be immaterial, because of the classification of cities by the General Assembly, and the doctrine formerly applied by the courts to such classification.

"That there has long been classification of the municipalities of the state is true. It is also true that while most of the acts conferring corporate powers upon separate municipalities by a classified description, instead of by name, have been passed without contest as to their validity, such classification was reluctantly held by this court to be permissible."

The court then stated that originally the laws making classification contemplated that on an increase of population municipalities should pass from one class to another, and that the classification should be permanent; but that under subsequent legislation municipalities did not by mere growth pass into another class; and it therefore concluded that under such classification the act was special.

[3] State *ex rel.* Attorney General *v.* Beacom, 66 Oh. St. 491.

ment of ouster against the city of Cleveland on the ground that all the legislation under which it had existed for years and was then exercising its corporate powers was unconstitutional, might work great public harm, made an order suspending execution until October, 1902. A similar *quo warranto* might have been successfully prosecuted against every city in the state. To meet the emergency, a special session of the legislature was called in August, 1902, at which substantially all the laws with respect to municipal corporations were repealed and a new and elaborate municipal corporations act of 231 sections was adopted.[1] The construction of this new statute is apparently not very clear, for the Court of Common Pleas construed it one way and was affirmed by the Circuit Court, but the Supreme Court pointed out what it held to be errors of these two lower courts and reversed both their judgments.[2]

Another doctrine has arisen, which might be called the "germane doctrine." Some courts in attempting to find a principle on which to ground their review of legislative classification have announced the rule that this classification must be *germane* to the purpose of the legislation.

"The true principle requires something more than a mere distinction by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such nature as to mark the objects so designated *as peculiarly requiring exclusive legislation.* There must be a substantial distinction having a reference to the subject matter of the proposed legislation between the objects or places embraced in such legislation or the objects or places excluded."[3]

Observe that the courts state that this is a rule which the legislature ought to follow, and they will themselves look into the question of the necessity and propriety of a statute in order to determine whether or not it conforms to the rule. There are at least two objections to this: First, it is not a proper function of a court to determine what legislation is necessary or proper; that is emphatically the function of the legislature; second, it is impossible as a matter of practice for the legislature to conform to any such rule. Even if it were possible for its members to understand the test as stated by the courts, it would still remain for the

[1] Laws of Ohio, Special Session 1902, p. 20.
[2] Zumstein *v.* Mullen, 67 Oh. St. 382.
[3] State *v.* Hammer, 42 N. J. Law 436, 440.

courts ultimately to determine whether the legislation was necessary or proper for the class of municipalities for which it was attempted. It is thus uncertain whether a given statute is constitutional until its necessity or propriety has been judicially reviewed. The legislature, on its information, and the courts, on theirs, might very well come to different conclusions.

As an example of the application of the germane rule may be mentioned a New Jersey case[1] in which the Court of Errors and Appeals decided that the School Act of March 23, 1900, was special legislation, although the Supreme Court had held that it was general. The act provided one method of government for schools in municipalities divided into wards and another for schools in those not so divided.[2]

The effect of this rule as administered by the courts, is that the classification of municipal corporations and to some extent the subject matter of the legislation must be such as the courts think proper. They have apparently supposed that by this formula they are laying down a principle of law as to the construction of the statutes, but an examination of the decisions must convince the reader that if they are not really deciding as to the propriety of the legislation, the boundary line between the two is neither well defined nor capable of definition. The actual administration of this rule makes chaos in the statute law of a state, as is shown by numerous other cases in New Jersey and by the condition of the statute law there.

If the courts are at liberty to look into the question of the necessity or propriety of a statute to see whether its classification is germane to its purpose, then there may possibly be some ground for their going further and examining whether as a matter of fact, as well as of form, the legislation is as general as the necessity or propriety. The Supreme Court of Minnesota went to this extent in holding a law entitled "An Act to provide additional means for completing and furnishing the court house and city hall building now in process of erection in the city of

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[1] Lewis *v.* Jersey City, 66 N. J. Law 582.

[2] The court in its opinion said, p. 586: "The classification must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded and making the legislation *fit and appropriate* to those included and inappropriate to those which are omitted. It must embrace all, and exclude none whose conditions and wants render such legislation equally appropriate to them as a class." P. 588: "The division of municipalities into wards has no relation whatever to the management and control of public schools and the support of education."

Minneapolis, and to authorize the issue and sale of bonds therefor," was general.[1] On the first argument, the attorneys as well as the court apparently assumed that the act was special, the discussion being as to whether or not it was an act "regulating the affairs of any county or city." The court held that it was, and hence was void. On re-argument, the position was taken by counsel that the act was general, and the court so held. Their reasoning is interesting, to say the least.[2] They went beyond the mere form and looked into the substance of the legislation to see whether it was general in fact, — that is, whether it applied to all cases of the kind which existed in the state; and as they found that the combination of unfinished county court house and unfinished city hall existed only in Minneapolis, they held that it was general. If such reasoning be valid, it is a little difficult to see how there can possibly be any such thing as special legislation. "Special" means belonging to or relating to a species; and if legislation which applies to a particular city by name and applies to that city because it is different from every other city, is not special, then special legislation would seem to be a myth.

The legislatures of some of the states, impressed with the fact that the people of a particular city may need legislation specially applicable to such city, have arrived at the following solution of the matter: Whenever any city desires legislation peculiarly adapted to itself, it applies to the legislature and has an act passed, which in terms includes all cities in the state, but contains

[1] Laws of Minn., 1893, c. 243; State *ex rel.* Commissioners *v.* Cooley, 56 Minn. 540.

[2] The court said, p. 552: "The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact, although general in form; and it may be *general in fact*, although special in form. The mere form is not material. To illustrate, suppose mountains were one of the subjects on which special legislation was prohibited, and that there was only one mountain in the state; a law referring to that mountain by name would be special in form, but general in fact, according to all the rules." P. 554: "Inasmuch as courts will in such cases take judicial notice of all facts bearing on the constitutionality of the law, we know that this is the only case of the kind — the only member of the class — which now exists, or ever can exist; for, under the constitutional amendment of 1892, no other special law like that of 1887 can be enacted. Hence the classification is complete. Again, the legislation [providing funds to complete the building] is confined to matters connected with and peculiar to the distinctive features of the case; or, in the language of the rule, the characteristics forming the basis of the classification are germane to the purpose of the law. Finally, as we have already seen, the facts that the law is special in form, and that it applies to only a single object, or, in the language of another rule, that the class consists of only one member, are not important. Our conclusion is that the act, although special in form, is general in fact, within the meaning of the constitution."

a clause that it *shall apply to such cities only as by vote of the people shall adopt the same.* Under this legislation there are in New Jersey several complete incorporation acts, each of which states that it is applicable to all cities in the state, and also that it is not applicable to any city except those which adopt it. Pickwick himself could not do better. No other city adopts the act, or cares anything about it, but each one may have its own similar act passed. The courts have solemnly declared that such legislation is general.[1]

Another method of obtaining legislation to meet the needs of a particular city is as follows: An act is drafted containing complete provisions with respect to some subject, and in terms is made to apply to all cities, but somewhere there is a clause which provides that it shall not be construed to repeal any other act on the same subject.[2] The result is that there are a multitude of general acts on the same subject, each applying to all cities. Any city can take its choice, and if it does not find one to suit, can have another passed.

The New Jersey courts have, among other numerous decisions, announced the principle that any law which applies to all cities in the state is general; so likewise any which applies to all townships, to all counties, or to all boroughs. The reason given is that any law which applies to all the members of a "common law" class of municipalities is general.[3] "The common law classification of municipalities" has a plausible sound, but there is no such thing. Municipalities are things of statute or charter creation, or,

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[1] *In re* Cleveland, 22 Vr. (N. J.) 319, 23 *ibid.* 188. Chief Justice Beasley, giving the opinion of the Supreme Court, said, with respect to the limitation of time within which the act must be adopted: "It is true that this provision may eventuate in the production of different local results, but such outcome is not the necessary effect of the law, and there is no indication that such an end was in view. This law is capable of coming into operation within the prescribed time in every city of this state. It is, therefore, within the meaning of the Constitution; a general and not a local act, for, as has been just said, it must be regarded either as general or special at the time of its enactment, and it is not to be ranked in the former class by reason of the fact of its subsequent general adoption nor in the latter class because of its partial rejection."

The Court of Errors and Appeals declined to pass upon the validity of the proviso which limited the time for the election to some time prior to October 1, 1890, as, in its opinion, it did not need to pass upon that proviso in order to sustain the validity of the act and what was done under it with reference to Jersey City in the case then before the court.

[2] When this clause of non-repeal is omitted, as it frequently is, the task of construing and reconciling the vast mass of general laws on the same subject becomes well-nigh impossible.

[3] Hermann *v.* Guttenberg, 63 N. J. Law 616.

in rare instances, possibly, in England existed by prescription, presupposing a grant of a charter. They are not common law creations. If they were, they ought to be alike in the different states having the common law. In New Jersey there are towns, townships, and boroughs, but in the New England states, in which there can be no denial that the common law exists, the municipalities known as boroughs or townships or villages with village governments are things almost, if not quite, unknown. It is not obvious, therefore, with what propriety the New Jersey courts speak of the "common law" classification of municipalities. They may mean such municipalities as are "common" in New Jersey. But municipalities in the State of New Jersey, counties perhaps excepted, are subject to be created, altered, or destroyed by the legislature, and the same is true in other states. Suppose there is a statute that applies to all cities and it is desired to have such statute apply to one borough but not to all boroughs. Under this "common law" rule legislation applying to all cities and to only one borough would not be permissible, but the legislature changes the name from borough to city, and, presto, the legislation applies to the borough under the name of city. Clearly the constitution in providing that there should be only general laws did not intend to make the application of this clause depend upon a mere matter of names, which the legislature might change as often as it would.[1] It may be said that the legislature might not resort to any such change, but we are now speaking of a clause which is to be binding upon the legislature, and not of a matter in their discretion.[2]

Such a question might arise in any state where the constitution in prohibiting special laws uses the generic term "municipal corporations," or any other similar one. For instance, the courts might be called upon to decide whether or not a law applying to all "cities," or to "all villages," but not to other municipal corporations, would be general.

We have seen some of the rules which the New Jersey courts have stated with reference to permissible classifications; also some of the legislation which under these rules has been held valid. A multitude of statutes also have been held invalid, and a multitude of other questionable statutes have not been passed upon. The

[1] Probably the authors of this clause in the constitutions gave little thought to the mischievous results which it would produce.

[2] See the earlier case, Borough of Hightstown *v.* Glenn, 47 N. J. Law 105, where a different rule was stated.

total result of this experiment has been an enormous mass of legislation. The Revised Statutes of New Jersey for 1895 comprise three immense volumes, and since that date the session laws contain a great number of so-called general laws. To say that the statutes constituting the municipal law of New Jersey are in great confusion is to state the matter much too mildly.[1] When one remembers that a great modern city raises and expends each year many millions of dollars, and is frequently incurring large obligations for public improvements, making contracts, issuing bonds, levying taxes, creating liens, and affecting land titles, it is obvious that certainty is a fundamental requisite.

The Legislature of New Jersey[2] recently undertook to provide for a comprehensive system of public schools, having some regard to existing conditions in the various municipalities of the state. Their act came before the Supreme Court,[3] and three judges held it valid. On writ of error a majority of the members of the Court of Errors and Appeals held it special and invalid. This decision would have stopped the public schools in the entire state. A special session of the legislature was called in October, 1903, to provide some new law, and the legislature then made another attempt to pass a general one. If the higher courts of a state find it difficult to know what is a general statute, how much less ought the

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[1] The writer had occasion recently to examine some of the laws affecting the city of Hoboken, New Jersey, and among others he examined a compilation entitled "Charter of the City of Hoboken, together with the General Laws affecting the City," making 850 printed pages. As a practical illustration of the bewilderment of the profession in dealing with the constitutional clause permitting only general legislation, the preface to this compilation is very interesting, — the more so as it was obviously written with no idea that it would ever be quoted in an article like the present. It is as follows:

"The constitutional inhibition which renders special legislation inapplicable to cities is the compiler's principal, yet ample, apology for the dimensions of this work and the delay incident to its production. The legislation specially applicable to the City of Hoboken under the guise of general laws is in the main problematical. Whether the laws relating to cities contained in this compilation will in each instance prove applicable to Hoboken, or stand the test of the constitutional mandate, can be determined with certainty only after presentation to the judicial power. The compiler's aim has been (and it is hoped that in this respect he has met with some measure of success), out of the vast mass of uncertain and incongruous material before him, to cull and compile in a manner at once orderly, clear, and comprehensive to the citizen and official, such laws as in the opinion of the reviser may probably affect the city.

"JAMES F. MINTURN,
"Counsel to the City of Hoboken."

"Dated October 1st, 1890.

That was in 1890. Since that date confusion has become "worse confounded."

[2] "An Act to establish a system of public instruction," approved March 26, 1902.

[3] Riccio *v.* Mayor, etc., of Hoboken, 54 Atl. Rep. 801.

average lawyer to know; and how much less still ought the average legislator to be expected to be wise enough to enact general statutes.

Legislation for municipalities ought not to be a set of general rules drafted for some Platonic Republic or Utopia, but ought to be such as will meet the actual needs of a real community. Not all cities in a state are alike, nor are any two cities alike merely because they have nearly the same population. One may be a manufacturing city, another may contain a large university, and still others may be mining cities, seaports, summer resorts, or seats of government. Moreover, a city may be a combination of some or all of these different kinds; and those which are about equal in population and in other respects may vary as to the education, wealth, and character of their inhabitants. No sane man would say that all such cities needed the same legislation.

Furthermore, certain peculiar conditions may arise necessitating special legislation which would be inapplicable to cities at large. Take, for example, the city of Galveston, which in 1900 was devastated by a tropical storm. Peculiar problems arose with reference to the health of its inhabitants, its ability for a time to meet the payment of interest on its bonds, and its protection, rebuilding, and welfare in the future. It is the height of absurdity to suppose that any such emergency could be properly met by general legislation. Fortunately the Constitution of Texas permits the enactment of special laws for cities having over 10,000 inhabitants, and immediately after this disaster, Galveston obtained a new charter with special provisions to meet the emergency. This is one instance. The recent fire in Baltimore and the great fires in Chicago and Boston might well have created the necessity for legislation wholly inappropriate to any other city. Again, take the instance, familiar to the citizens of New York, of the necessity for underground railroads. How absurd it would be to enact such legislation for all the cities in the state! Instances like these might be multiplied.[1] There is no good reason why the necessary legislation should not be in the form of a special law. Even if the constitution has a clause prohibiting such laws, the

[1] This need of municipalities for special legislation has been recognized by the courts in states having such clauses in their constitutions, as well as by others. In Wheeler *v.* Philadelphia, 77 Pa. St. 335, 350, Mr. Justice Paxson, giving the opinion of the court, said: "If the classification of cities is in violation of the Constitution, it follows, of necessity, that Philadelphia, as a city of the first class, must be denied the legislation

history of the past shows that some way will be found to make so-called general legislation fit the case, but nobody for an instant supposes that such legislation is really general in any proper sense.

There is a desire among a certain class of idealists to reduce law to a set of general rules applicable to all conditions for all time, and to dispense with special legislation for particular needs. It is such a delusion as this which has led people to think that there could be one set of general laws for all cities or great numbers of cities. In actual practice such a programme has always failed and always will fail. Each municipality has its own physical location, its own people, industries, needs, and desires; and to suppose that any one is capable of writing a general law which will provide for all those special needs is absurd. It is sufficient to recall how legislation originates. Some municipality finds it necessary or proper to have certain laws passed to meet some actually existing situation. No other municipality has the same need or cares to have the same law enacted, but each in turn has its own needs. In this country, where the people love liberty, and liberty for each community to develop along its own lines, why should the constitution say, "You cannot have this law unless it is enacted for every other community in the state," although no other needs or desires it? The legislation which a community desires is generally obtained. So that this vision of the idealists, which is a mere vision and must always remain so, has accomplished little more than to bring upon legislatures, and to some extent upon courts, the odium of practically disregarding the constitution. The effect upon public morality cannot be anything but harmful.

It may be asked what remedy is proposed for these evils. In the opinion of the writer, the answer is plain, namely, a return to the good old-fashioned system of special legislation for municipalities; not that all legislation ought to be special, but that the legislature should be free to enact such legislation if in its judgment the circumstances make it necessary or appropriate. For this purpose the restrictive clauses in the state constitutions should be repealed. When a city asks for legislation peculiar to its needs,

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necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the Constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. And for this there is absolutely no remedy but a change in the organic law itself."

why require the legislature to go through the circumlocution of using general words? Why not mention the city by name, and state exactly and specifically what the legislation is? Why not label it so that people will know what it is intended to accomplish? The sham of so-called general legislation does not deceive the legislators, the people, or the courts. Moreover, it is open to the objection that it is an apparent attempt to conceal the true nature of the legislation, and it may be that under the guise of general laws many things have been inserted in our statutes that could not have found a place there if they had been plainly labeled.

The open and honest way when a municipality desires a special act is to apply for it and have the legislation enacted by name. If desirable, the constitution might provide that whenever a special act in reference to a municipality is requested, notice thereof should be published in some newspaper in the place to which it is to apply. This would give an opportunity for public sentiment to express itself, and in the long run the legislature could not enact any special laws which were not acceptable to that sentiment.

One of the most serious objections to having a constitution prohibit special legislation is the uncertainty and difficulty which is thereby introduced into the administration of municipal laws. Under the old system of special charters and special laws it was fairly easy for a practising lawyer to examine the charter of a city, its amendments, and its special laws within a reasonable length of time, and to form a fairly definite conclusion. Now under such a prohibition, he must examine, first, the special charter and its amendments (for generally the clauses in the constitutions did not repeal special charters and did not require the legislature to repeal them), and second, all the voluminous general laws of the state with reference to municipalities; and he must make up his mind if he can, first as to what general laws are by their terms applicable; then as to whether the special charter provisions, if any, govern, or whether the general law provisions, if any, govern; and finally as to which one of numerous general laws applies. But this is not all. On top of these difficulties comes the question whether the so-called general legislation is really "general." To determine this, he must make careful examination of the statute and of the numerous decisions of the courts, which have adopted various principles of interpretation, and which are themselves by no means easy to interpret. It frequently happens as a result of such an exhaustive and exhausting examination that he must advise his clients that it

is not safe to act until the particular statute which is the subject of investigation has been reviewed by the courts. What is the compensation for all this uncertainty? Absolutely nothing. Even if the so-called general laws were in form general, it would be a mere worship of formalism.

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